

retail offering that should be subject to the duty to resell at the wholesale rate. Cognizant of this situation, the FCC made a determination as to when a promotional price ceases to be short-term and must be treated as the retail rate to be used in calculating the wholesale rate.

We believe that promotions of up to 90 days, when subjected to the conditions outlined below, will have significantly lower anticompetitive potential, especially as compared to the potential procompetitive marketing uses of such promotions. We therefore establish a presumption that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers. Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to 251(c)(4)(A).<sup>8</sup>

Despite the ILECs' argument that gift card type promotions are incentives and/or marketing tools used to distinguish their services in the marketplace, these promotions are in fact promotional offers subject to the FCC's rules on promotions.<sup>9</sup> While these promotional offerings are not discount service offerings *per se* because they do not result in a reduction of the tariffed retail price charged for the regulated service at the heart of the offerings, they do result in a savings to the customers who subscribe to the regulated service. The longer such promotion is offered, the more likely the savings will undercut the tariffed retail rate and the promotional rate becomes the "real" retail rate available in the marketplace. The promotion reduces the subscriber's cost for the service by the value received in the form of a gift card or other giveaway. The tariffed retail rate would, in essence, no longer exist, as the tariffed price minus the value of the gift card received for subscribing to the regulated service, i.e., the promotional rate, would become the "real" retail rate. Thus, the ILEC could use the promotion as a *de facto* rate change without changing its tariff pricing. The FCC hoped to avoid this situation, where the promotional rate competes with the tariffed price for a long or indefinite period of time, by defining the point at which the promotional rate would become a retail rate to be discounted for resale as the 91<sup>st</sup> day the promotion is available to end-users purchasing a particular telecommunications service. In other words, the FCC decided that after 90 days, resellers are entitled to the promotional rate (the "real" retail rate) minus the wholesale discount.

Therefore, pursuant to TA96, in order for a gift card type promotion not to require an adjustment to the resale wholesale rate (caused by the fact that the retail price has in effect been lowered), such a promotion must be limited to 90 days, unless the ILEC proves to the Commission that not applying the resellers' wholesale discount to the

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<sup>8</sup> Local Competition Order, ¶ 950.

<sup>9</sup> See *In re AT&T Communications of the Southern States, Inc.*, Docket No. 960833-TP, PSC-96-1579-FOF-TP (Fla. P.S.C. 1996); *In re AT&T Communications of the Southern States, Inc.*, Docket No. 6801-U (Ga. P.S.C. 1996); *In re Sprint Communications Company, L.P.*, Case No. TO-97-124 (Mo. P.S.C. 1997); *In re US West Communications, Inc.*, Docket No. 70000-TT-98-379, Record No. 3992, (Wyo. P.S.C. 1999) (rejecting similar "marketing tool"/"marketing expense" arguments offered by ILECs to avoid resale obligation with regard to promotions).

promotional offering is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation.<sup>10</sup>

Does the record before the Commission sufficiently establish that it is reasonable and nondiscriminatory for ILECs not to apply the wholesale discount to the promotional rate for gift card type promotions? The Commission finds it extremely noteworthy that while its *Order* seeking comments on the questions raised by the Public Staff's Motion was served on companies authorized to resell local service in North Carolina, no resellers filed comments addressing the ILECs' resale obligation with respect to promotional offerings. This absence of comment would appear to suggest that the reseller community believes competition will not be stifled or unduly harmed by gift card type promotions such as the one presently being offered by BellSouth since June 29, 2004 and scheduled to run until March 31, 2005. Although the resellers offered no comments, ILECs such as BellSouth commented that they offer these type promotions precisely because there is robust competition they are trying to meet by distinguishing their services with gift card type promotions. While these promotions do provide a savings and therefore a type of discount to subscribers, they do not in fact lower the charge to the subscribers for the regulated services purchased. Therefore, the Commission believes these promotions do not have the same degree of anticompetitive effect that a direct discounting of the retail price would have on the reseller market. Some customers will likely subscribe to the regulated service offering at the retail rate, although the gift received (particularly a gift card) may have little value to them.<sup>11</sup> Furthermore, the ILECs continue to resell the regulated services offered in their promotions to resellers, reducing the retail rate for these services by the amount of the applicable wholesale discount. Hence, the ILECs argue they are meeting their statutory obligation to resell their retail telecommunication services; resellers are not being prevented from reselling these services. Moreover, after purchasing services from the ILECs at the wholesale discount rate (a rate made possible by excluding ILEC marketing costs from the resale price), resellers may resell these services to end-users and may offer promotional inducements at their own expense whether or not the ILECs offer such promotions. In fact, ILECs have argued that their promotions are in response to promotions (fee waivers and the like) offered by resellers. Finally, to the extent that these gift card promotions are for a reasonably limited duration and are not offered consecutively, their procompetitive effects in a market that is more competitive than it was in 1996 when the Local Competition Order was issued will likely outweigh the anticompetitive effects.

Given that there has been no opposition to gift card type promotions from the reseller community, the Commission is reluctant to establish a rule that the benefit of these promotions must be offered to resellers in addition to the reseller discount. To the contrary, given the absence of opposition, the Commission is persuaded by the arguments put forth by the ILECs. Although the Commission believes that restrictions on resale obligations must be considered on a promotion-by-promotion basis, some

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<sup>10</sup> 47 C.F.R. § 51.613(b).

<sup>11</sup> For example, BellSouth commented that some customers accepting gift card type promotions never use the gift card or coupon for check, etc.

restrictions on resale of some gift card type promotions that run for more than 90 days may be proven to be reasonable and nondiscriminatory. While promotions must be analyzed individually for their anticompetitive effects, the Commission finds that, upon proof that it is reasonable and nondiscriminatory not to offer the benefit of a promotion offered for more than 90 days to resellers, ILECs will not be required to provide such benefit to resellers in addition to the established reseller wholesale discount. However, ILECs should be mindful that resale restrictions on unreasonably long, unlimited or permanent promotions that compete with and undercut the tariffed retail price for services would gut the resale obligation of TA96 and will be held unreasonable.<sup>12</sup>

With regard to BellSouth's 1FR + 2 Cash Back promotion, based on the Commission's current knowledge, the Commission would be inclined to find that a restriction on resale is reasonable and non-discriminatory. Resellers have not complained or asked the Commission to find the restriction unreasonable or harmful to competition. Resellers have not been precluded from reselling the regulated service and are able to purchase the service at the tariffed rate minus the wholesale discount. The wholesale discount was, in part, set by deducting ILEC marketing expenses from the ILECs' costs for the regulated service—at least in part a recognition that resellers would have their own marketing expenses. Resellers remain free to offer, at their own expense, promotional inducements to customers who purchase the tariffed service(s) from them. Although the Commission would ordinarily be concerned about a promotion in competition with the tariffed offering for a nine-month period (from June to March), BellSouth's promotion will be offered for a limited time, and the resellers' apparent disinterest or indifference would tend to persuade the Commission that, at least with respect to 1FR + 2 Cash Back, the anti-competitive effects caused by a nine-month promotion that is unavailable to resellers are outweighed by the procompetitive effects.

2) *Is an ILEC offering a bundle of regulated and nonregulated services for more than ninety days obligated to offer the bundle, the regulated portion of the bundle, or both to resellers during the term of the promotion or, as BellSouth has contended, is no part of such a bundle subject to the resale obligations?*

The **Public Staff** argued that the regulated portion of a mixed bundle containing regulated services is subject to resale. Companies should not be allowed to evade their resale obligations by placing regulated services in bundles, discounting these services, and refusing to offer the regulated portion of the bundle to resellers. Bundling regulated services does not suddenly make those services immune from regulation. Bundles certainly can be in the public interest by allowing customers to buy services they desire at a lower rate. However, they are not immune from regulation.

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<sup>12</sup> The Commission notes that to the extent a gift card type promotion may be associated with a mixed bundle offering of regulated and nonregulated services with respect to which an ILEC invokes the one-day notice in G.S. 62-133.5(f), case-by-case determinations for the purpose of determining resale obligations will not run afoul of the ILECs' right to offer the promotion without obtaining the Commission's approval. The Commission's case-by-case determination would not be for approval purposes but would be to determine whether, under TA96 and the FCC's rules, the benefit of a promotion offered for more than 90 days must be accounted for in determining the retail rate that must be discounted by the wholesale discount.

The **Joint Commenters** did not address this issue.

**BellSouth** maintained that a company is not required to resell mixed bundles containing non-telecommunications services or services provided by other entities. There is no obligation to make the separate parts of a bundled offering available to resellers at a "hypothetical" discounted price which would be the equivalent of providing resellers a service at a price that does not relate to the prices for which those services are sold at retail to non-carrier subscribers. However, a company must offer for resale each regulated service contained in a bundle at the retail rate minus the wholesale discount.

The **ILECs** commented that if a bundle consists of regulated and nonregulated services, resellers should not be allowed to sell the bundle at the promotional discount rate. Requiring the resale of bundled offerings containing regulated and nonregulated services would be contrary to the TA96.

#### **DISCUSSION OF QUESTION B-2**

As has been discussed hereinabove, Section 251(c)(4)(A) of TA96 requires ILECs to offer for resale at wholesale discounts any telecommunications service that it provides at retail to non-telecommunications end-user subscribers. The FCC has held that promotions offered for more than 90 days must be made available to resellers at the promotional rate minus the wholesale rate, because any promotion exceeding 90 days would be in competition with the retail rate and would allow the ILEC to undercut the reseller by shifting customers to the promotional offerings and denying the benefits of those offerings to the resellers. An ILEC's obligation to make the benefit of a promotional offering available to resellers is, therefore, directly related to whether the promotional rate is available to the end-user retail customer in such a way as to be in competition with the tariffed retail rate. Service bundles, such as those implicated by Question B-2, are not categorically exempt from the resale obligation.<sup>13</sup>

In the context of analyzing the obligation of ILECs to resell services, there are at least two different types of mixed bundle offerings. The first type is similar to the gift card type promotion and must be made available to resellers if offered for more than 90 days, unless a restriction on reselling the promotion is reasonable and nondiscriminatory. The second type of mixed bundle offering requires the customer to subscribe to a bundle of services, the total cost of which exceeds the cost of the consideration of the regulated service(s) on a stand-alone basis if purchased from the tariff. ILECs should not be obligated to resell this second type of promotion.

The first type of mixed bundle promotion consists of regulated telecommunications services, provided at no less than the tariffed retail rate, and nonregulated services, provided free of charge. For resale purposes, this type of promotion should be treated no differently than gift card type promotions. Promotions that allow the customer to receive something of value as a giveaway for the purchase of

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<sup>13</sup> In the Matter of American Communications Services, Inc., ¶¶ 41, 51, 52.

a regulated telecommunications service would provide the customer with a discount off the price of the regulated service, i.e., a discount equal to the value of the giveaway, whether it be a gift card, cash back or free nonregulated services. These promotions permit the customer to purchase the regulated service for the same price listed in the tariff but gives the customer more for the same amount of money by providing the customer a giveaway of some value. These promotions, therefore, compete head-to-head with the retail price. The customer's choice is between paying the retail price of, for example, \$20, and receiving only the tariffed regulated service, or paying the same \$20 retail price for the same service but receiving an additional value or giveaway for making the exact same dollar cost purchase. Thus, the promotion reduces or discounts the retail price by the value of the giveaway. When such a discount of the regulated service is offered for more than 90 days, the discounted price (the tariffed rate minus the value of the giveaway) becomes the "real" retail rate and competes directly with the tariffed rate for the regulated service. Therefore, in order for the reseller to receive the true wholesale rate, the wholesale discount must be from the discounted promotional rate. The ILEC must allow the reseller's purchase price to be determined by applying the wholesale discount to the promotional rate that is, in effect, available at retail to end-user subscribers. To further clarify the ILEC's resale obligation as to this first type of mixed bundle promotion, the Commission notes that the ILEC does not have to allow the reseller to purchase the bundle of services offered in the ILEC's promotion as long as it offers for resale each telecommunications service component of the bundle at the promotional rate minus the wholesale discount. Of course, if the promotional rate is not available to end-user subscribers for more than 90 days, the ILEC is not obligated to permit resellers to take advantage of the promotional rate.

The second type of mixed bundle promotion also consists of both regulated telecommunications services and nonregulated services, but the entire bundle is offered to the customer for more consideration than the customer would pay if purchasing from the tariffed offering.<sup>14</sup> For resale purposes, the ILEC should not be required to provide these bundled offerings or the benefit of these promotions to resellers. Such promotions do not compete directly with tariffed offerings. With these promotions, end-user subscribers cannot purchase the bundle (or the regulated portion of the bundle) for a price less than or equal to the tariffed retail rate for the regulated service(s) in the bundle. The subscriber to such a promotional offering must accept the complete bundle and pay not only for the regulated service(s), but also for the additional services in the bundle at a total cost that exceeds the price of the regulated service(s) when purchased on a stand-alone basis under the tariff. Some or all of the services (regulated and/or nonregulated) may be discounted, but the customer cannot purchase the regulated portion of the bundle, discounted or not, without purchasing the entire bundle for consideration that exceeds the tariffed price for just the regulated retail services. Any discount that may apply to a regulated service in such a promotional bundle is not available to end-users because they cannot receive the discounted service

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<sup>14</sup> For purposes of this discussion on the second type of mixed bundle, more consideration includes all additional consideration (beyond the tariffed price) from the customer, such as the price paid for service, the signing of a contract binding the consumer to purchase a service for a set or extended period of time, or the subscription to a certain increased level of service at a specified premium price.

unless they purchase the entire bundle of services for consideration that exceeds the retail price for the regulated service. Therefore, with these promotions, neither the promotional bundle nor the regulated services in the bundle competes directly with or undercuts the equivalent regulated tariffed offerings. The customer's choice is between the regulated service(s) at the tariffed price on the one hand, or the regulated service(s) plus additional services for a total price exceeding the cost of the stand-alone regulated service(s) under the tariff on the other hand. The promotional bundle, which costs the customer more, is not a lower cost means of obtaining the regulated services in the bundle; instead, it is a higher cost means of purchasing the service because the customer can only receive the regulated service in the bundle by paying additional money or consideration for additional services.<sup>15</sup>

However, ILECs are advised that if promotional mixed bundles should be offered for a total price that is less than or equal to the price of the regulated services offered on a stand-alone basis under their tariffs, the promotions would cause head-to-head competition with the tariffed retail rates. Accordingly, with regard to the regulated services in such a bundle, the benefit of such promotions offered for more than 90 days would have to be offered to the resellers, as discussed in the section above on the first type of mixed bundle offerings. In any event, as with the first type of promotions, ILECs are not required to make the bundles themselves available to resellers and would only have to make the promotional rate of the regulated services available for resale if the entire bundle was offered for less than the price of the tariffed regulated services.

3) *If the ILEC is required to offer the bundle or the regulated portion of the bundle to resellers, does the reseller discount apply in addition to any promotional discount offered in the bundle to the ILEC's end users during the term of the promotion?*

The **Public Staff** argued that the regulated portion of a bundle is subject to resale, and both the promotion discount and the reseller discount should apply. The Public Staff opined that, since the promotion discount has lowered the retail rate of the regulated service, the wholesale discount should be applied to the reduced retail rate.

The **Joint Commenters** did not address this question.

**BellSouth** stated that, as set forth in its initial comments, a service is required to be offered for resale at the wholesale discount only if it is made available to end-users at the retail rate. Retail customers do not have the ability to pick and choose selected portions of bundles. They can purchase a component of a bundle alone if that service is available on a stand-alone basis, and when they do so they pay the tariffed rate for the individual service, not some percentage of the price for a bundle that includes that service (and others). In those cases, BellSouth makes the retail service available for resale at the retail price minus the wholesale discount. There is no further requirement

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<sup>15</sup> While the bundle costs more than just the regulated service(s), a customer who wants the additional services *and* the regulated services saves money by choosing the promotional bundle because it is priced lower than the total cost of the services purchased individually.

in any jurisdiction that BellSouth break apart and resell parts of bundles piece-meal, and there is no valid basis for the Commission to create one.

Again, the ILECs commented that if a bundle consists of regulated and nonregulated services, resellers should not be allowed to sell the bundle at the promotional discount rate. Requiring the resale of bundled offerings containing regulated and nonregulated services would be contrary to the TA96.

### **DISCUSSION OF QUESTION B-3**

This question has been answered by the discussion hereinabove. Whenever an ILEC is required to make the benefit of a promotion available to resellers because it is being offered for more than 90 days and is therefore in competition with the tariffed retail rates, the reseller discount applies to the promotional rate. That is to say, the reseller discount applies in addition to the promotional discount.

WHEREUPON, the Commission reaches the following

### **CONCLUSIONS**

- 1) That gift cards, checks, coupons for checks or similar types of benefits are promotional discounts for the purposes of G.S. 62-133.5(f);
- 2) That promotional discounts are considered "price discounts that apply exclusively to services not regulated by the Commission" pursuant to G.S. 62-133.5(f) when the benefit of the discounts is funded solely from or charged against the nonregulated operations of the local exchange carrier;
- 3) That the source of funding for any promotional discount is determinative of whether the discount "applies exclusively to services not regulated by the Commission." A discount funded in whole or in part by charging it to a regulated service or to regulated service operations is not one that "appl[ies] exclusively to services not regulated by the Commission;"
- 4) That LECs who avail themselves of the one-day notice provision of G.S. 62-133.5(f) necessarily represent that any promotional discount appl[ies] exclusively to the nonregulated portion of a mixed bundle, and that any discount given for the purchase of a mixed bundle will be funded, accounted for or applied against only the nonregulated portion of the bundle. The Commission declines to expand its Order of January 2, 2004 to require a LEC to specify the funding source of its promotions;
- 5) That the benefit of a gift card type promotion offered for more than 90 days must be made available to resellers such that resellers are permitted to purchase the regulated service(s) associated with the promotion at the promotional rate minus the wholesale discount, unless the ILEC proves to the Commission (per 47 C.F.R.

§ 51.613(b)) that not applying the wholesale discount to the promotional offering is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation;

- 6) That the benefit of a mixed bundle offering that results in a regulated service in the bundle being in direct competition with the tariffed retail rate for the regulated service must be made available to resellers if the bundled promotion is offered for more than 90 days, but the benefit of a mixed bundle offering that does not result in such direct competition with the tariff offering (as discussed above in this *Order*) need not be made available to resellers; and,
- 7) That whenever an ILEC is required to make the benefit of a promotion available to resellers because it is being offered for more than 90 days and is therefore in competition with the tariffed retail rates, the reseller discount applies to the promotional rate instead of the tariffed retail rate.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 22<sup>nd</sup> day of December, 2004.

NORTH CAROLINA UTILITIES COMMISSION

*Gail L. Mount*

Gail L. Mount, Deputy Clerk

pb121404.01

**EXHIBIT C**

STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH

DOCKET NO. P-100, SUB 72b

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled "An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services"	) ) ) ) )	ORDER CLARIFYING RULING ON PROMOTIONS AND DENYING MOTIONS FOR RECONSIDERATION AND STAY
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BY THE COMMISSION: On December 22, 2004, the Commission issued *Order Ruling on Motion Regarding Promotions*. On February 18, 2005, BellSouth Telecommunications, Inc. ("BellSouth") filed a Motion for Reconsideration or, in the Alternative, for Clarification, and for Stay. Also on February 18, 2005, Image Access, Inc. d/b/a New Phone ("New Phone") filed a Petition to Intervene and Comment Out of Time. The Commission granted New Phone's Petition to Intervene on March 3, 2005, and accepted New Phone's Comments for the record, but did not otherwise address them. This Order addresses both New Phone's comments and BellSouth's motion.

**New Phone's Comments**

A. The Commission's forecast and 47 C.F.R. 51.613(a)(2)

In its comments, New Phone complains that the Commission considered a specific promotion, which BellSouth offered in excess of 90 days, and forecasted that the Commission would be inclined to find that a restriction on the resale of the promotion was reasonable and nondiscriminatory. New Phone notes that the Commission's forecast was *dictum*, based in part on the Commission's perception that Competing Local Providers ("CLPs") did not object to BellSouth's refusal to offer the promotion for resale since no CLP filed comments or objections. New Phone explains that it and other CLPs were not indifferent on this issue, but failed to file comments or objections because the Commission's July 7, 2004 *Order* seeking comments did not indicate that specific BellSouth promotions of more than 90 days' duration would be considered or approved. According to New Phone, without regard to whether a CLP files an objection, Federal Communications Commission ("FCC") Rule 47 C.F.R. 51.613(a)(2) establishes that it is unreasonable and discriminatory for an ILEC to refuse to resell telecommunications services at the promotional rate minus the percentage wholesale discount when the promotional rate is offered to retail customers for more than 90 days.

## DISCUSSION

First, the Commission does not agree that its July 7, 2004 *Order* failed to provide CLPs with notice that BellSouth's 1FR + 2 Cash Back promotion could be under consideration. The Public Staff's motion for a ruling on promotions made express mention of the 1FR + 2 Cash Back promotion, the dispute with BellSouth regarding the availability of the promotion for resale, and the start and end dates for the nine-month promotion. In addition, the Public Staff's motion was an attachment to the Commission's *Order*, and the Public Staff again specifically identified and discussed the 1FR + 2 Cash Back promotion in the comments it filed on August 6, 2004 pursuant to the Commission's *Order*. Thus, the Commission believes that New Phone and other CLPs had adequate notice that the Commission could address the 1FR + 2 Cash Back promotion in examining and clarifying BellSouth's resale obligations. Nevertheless, the Commission granted New Phone's Petition to Intervene and accepted New Phone's comments for the record. Because New Phone's comments were not filed in time to be considered prior to issuance of the December 22<sup>nd</sup> *Order*, the Commission will consider them now and will treat them as a motion for reconsideration or, in the alternative, for clarification of the Commission's *Order Ruling on Motion Regarding Promotions*.

Second, the Commission generally agrees with New Phone's interpretation of 47 C.F.R. 51.613(a)(2): if a promotion involves rates that will be in effect for more than 90 days, an ILEC shall apply the wholesale discount to the special promotional rate for retail service rather than to the ordinary rate. The FCC has stated in express terms that short-term promotional prices do not constitute retail rates that are subject to the wholesale percentage discount and has defined short-term promotions to be those offered for no more than 90 days. The FCC reasoned that a promotion offered for 90 days or less has procompetitive effects that outweigh the anticompetitive effects of restricting the resale of such a promotion.<sup>1</sup> The clear implication of the FCC's rule and related opinions is a presumption that it is unreasonable and discriminatory for an ILEC not to resell telecommunications services at the promotional rate minus the percentage wholesale discount when the promotional rate is offered to retail customers for more than 90 days.

However, in its December 22<sup>nd</sup> *Order*, the Commission recognized that the FCC clearly intended that an ILEC may rebut this presumption as to promotions offered in excess of 90 days by proving that a restriction on resale of such promotions is reasonable and nondiscriminatory. "With respect to any restrictions on resale not permitted under paragraph (a) [e.g., a restriction on the resale of a long-term promotion that is offered for more than 90 days], an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory."<sup>2</sup> That is to say, not all promotions offered for more than 90 days

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<sup>1</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, (CC Docket 96-98); First Report and Order, FCC No. 96-325, 11 FCC Rcd 15499 (rel. August 8, 1996) ("Local Competition Order"), ¶¶ 949-50.

<sup>2</sup> 47 C.F.R. 51.613(b).

necessarily have anticompetitive effects that outweigh procompetitive effects. It may not always be unreasonable and discriminatory for an ILEC not to apply the wholesale discount to the 90-day-plus special promotional rate.

By its *dicta*, the Commission did not intend to suggest a change of law or to disregard existing FCC rules and orders. Instead, the Commission's discussion of the dispute implicated by BellSouth's 1FR + 2 Cash Back promotion recognized that FCC rules do permit an ILEC to restrict resale of a promotion offered at retail for more than 90 days, upon *proving* that the restriction is reasonable and nondiscriminatory. The Commission's discussion of factors an ILEC may present to establish that a restriction is reasonable and nondiscriminatory was not intended to be exhaustive nor meant to suggest that the presence of any one or all of the factors would be sufficient to prove that a given restriction is permissible under the FCC's rules. Rather, the Commission's opinion stressed that each 90-day-plus promotion, including the 1FR + 2 Cash Back promotion, would have to be examined on a promotion-by-promotion basis, and that, in the absence of an objection by a reseller, the stated factors could be considered and could have some persuasive value to the Commission in determining whether a particular restriction on resale is reasonable and nondiscriminatory.

### CONCLUSIONS

To clarify, the Commission's December 22, 2004 *Order* should not be read as a change of law or policy. If the Commission is called upon to determine whether a promotion offered for more than 90 days must be offered to resellers at the promotional rate minus the wholesale discount, the Commission will follow the law as stated in 47 U.S. C. 251(c)(4) and 47 C. F. R. 51.613 (a)(2) and (b). In order to withhold the benefit of a long-term (90-day-plus) promotional rate from resellers, an ILEC is first required to "[prove] to the [Commission] that the restriction is reasonable and nondiscriminatory." The Commission's discussion of the 1FR + 2 Cash Back promotion was intended only to offer a modicum of guidance as to some of the kinds of factors the Commission might find probative, in the absence of objection, should an ILEC seek to prove that a restriction on resale is reasonable and nondiscriminatory. The burden of proving any restriction reasonable and nondiscriminatory remains with the ILEC. The factors acknowledged by the Commission were not intended to be exhaustive or necessarily sufficient to meet the ILEC's burden of proof. The Commission will consider all arguments and admissible evidence presented and decide on a promotion-by-promotion basis (with regard to promotions offered in excess of 90 days) whether an ILEC has proved that a restriction on resale is permissible pursuant to 47 C.F.R. 51.613(b). The Commission cannot authorize a restriction on resale of a long-term promotion in the absence of such proof

#### B. The Commission's forecast and the parties' interconnection agreement

New Phone states in its comments that it is concerned that BellSouth may rely on the Commission's forecast with respect to the 1FR + 2 Cash Back promotion to avoid its obligation to resell promotions as provided by the terms of BellSouth's interconnection

agreement with New Phone ("Agreement"). According to New Phone, the Agreement provides that BellSouth must resell all telecommunications services at the wholesale discount rate subject to a list of restrictions set forth in the Agreement. New Phone states that the Agreement provides that all promotions must be available for resale at the wholesale discount rate except those promotions, as identified in the list of restrictions, which are offered for less than 90 days. New Phone further notes that the Agreement contains Parity provisions that may be violated if BellSouth fails to resell promotions in accordance with the terms of the Agreement.

## DISCUSSION AND CONCLUSION

The Commission's December 22, 2004 *Order* does not relieve any party of obligations it might have under an existing interconnection agreement. The Commission does not, based on the present record, express any opinion about the extent of any party's obligation under New Phone's interconnection agreement with BellSouth. Moreover, the Commission has no evidence before it suggesting that BellSouth has any intent to avoid the obligations established by its interconnection agreement with New Phone. Accordingly, the Commission clarifies that its December 22, 2004 *Order* relieves no party of any resale obligations it might have under an existing interconnection agreement.

### BellSouth's Motion

#### A. Resale Obligations and One-time Gift Promotions

In its motion for reconsideration or clarification, BellSouth argues that the Commission created a novel resale obligation for one-time incentive gifts that ILECs provide to their customers. According to BellSouth, the Commission's *Order* requires one-time upfront gifts "that are funded in whole or in part by the ILEC's regulated service operations" and offered as incentives to customers subscribing to retail services to be "made available to resellers, unless the ILEC proves to the Commission that not making [such gifts] available for resale is reasonable and nondiscriminatory." BellSouth suggests that the Commission's ruling on resale obligations is based on language in the *Order* stating that "anything of economic value paid, given, or offered to a customer to promote or induce purchase of a bundled service offering of both regulated and nonregulated telecommunications services is a promotional discount." BellSouth calls the result of the Commission *Order* "patently silly" and "bizarre" because, according to BellSouth, the *Order* would require BellSouth "to give a CLP . . . a toaster for each customer to whom the CLP resells [a given] service," if BellSouth offers a toaster to any customer subscribing to that same service. BellSouth re-asserts its initial argument that because one-time gifts offered as incentives are not themselves "telecommunications services," they are not subject to the resale obligations of the Telecommunications Act of 1996 ("TA 96"). BellSouth further complains that CLPs are not required to pass the benefit of the promotional rate on to their customers and that it will often be difficult, if not impossible, to determine the value of one-time incentive gifts, since ILECs generally do not pay face value for such gifts.

## DISCUSSION

First, the Commission notes that BellSouth appears to cite language from Part A of the Commission's *Order*, which pertains to the interpretation of a state statute concerning when notice of a promotion or a bundled service offering must be filed, to complain about the Commission's holding in Part B of the *Order*, which pertains to federal resale obligations under TA 96. To clarify, the Commission's holdings with respect to resale obligations are not based on the ILEC's funding source for incentive gifts or marketing tools. The Commission's discussion of the source of funding for a promotion applies only to the interpretation of the state statute at issue in Part A of the *Order*.

Second, notwithstanding BellSouth's characterizations, the Commission's *Order* creates no new resale obligations. Section 251(c)(4) of TA 96 requires an ILEC "to offer for resale at wholesale rates any telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers." Section 252(d)(3) provides that the wholesale rates are to be determined on the basis of rates charged to subscribers. The Commission's *Order* merely recognizes what the FCC found in its 1996 Local Competition Order, *i.e.*, that long-term promotional offerings offered to customers in the marketplace for a period of time exceeding 90 days have the effect of changing the actual retail rate to which a wholesale requirement or discount must be applied. The FCC stated that there is to be no general exemption of promotional offerings from the wholesale requirement. However, in the same order, the FCC held that promotional offerings are exempt from the wholesale requirement if they are offered for 90 days or less because such short-term promotional offerings do not constitute the actual retail rate. The wholesale requirement, therefore, would not apply to such short-term promotions because they have been determined by the FCC not to change the actual retail rate. This bright line test was the FCC's compromise between allowing and not allowing ILECs to offer promotions that could undercut reseller pricing, so that short-term promotions, deemed procompetitive and beneficial to customers, would not have to be unnecessarily restricted.

One-time incentive gifts, including gift cards, check coupons and other merchandise, which are offered to induce customers to subscribe to telecommunications services, are promotional offerings. Therefore, if such gifts or incentives are offered for more than 90 days, as discussed in greater detail in the *Order*, they have the effect of lowering the actual, "real" retail rate. The retail rate, and thus the wholesale rate charged to resellers, must be determined on the basis of the "real" rate charged to subscribers. The Commission's *Order* does not prevent or in any way frown upon the use of such incentives as gift cards and other one-time upfront gifts. However, if the incentives, *i.e.*, promotions, are offered for more than 90 days, on the 91<sup>st</sup> day, resellers are entitled to have the benefit of the promotion reflected in the wholesale rate, meaning that the wholesale discount must be applied to the promotional rate—not to some other theoretical listed rate which has been undercut by a long-term promotional rate that is generally available to subscribers in the telecommunications marketplace. If an ILEC does not want to offer resellers a wholesale rate based on a retail rate adjusted

to reflect the effect of a promotion on the actual retail price, then the ILEC must not offer the promotion for more than 90 days.

Third, the Commission did not create a novel approach or new law when it held that "in order for a gift card type promotion not to require an adjustment to the resale wholesale rate . . . such a promotion must be limited to 90 days, unless the ILEC proves to the Commission that not applying the resellers' wholesale discount to the promotional offering [rate] is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation." As discussed above with respect to New Phone's comments, FCC Rule 51.613(b), read in tandem with Rule 51.613(a)(2), has long provided for the possibility that an ILEC could avoid applying the wholesale discount to the special promotional rate if the ILEC is able to prove that withholding the availability of the promotional rate from the reseller is reasonable and nondiscriminatory.

Fourth, the Commission is not persuaded by BellSouth's argument that one-time incentive gifts such as gift cards and toasters are not "telecommunications services" required to be resold pursuant to TA 96. The *Order* does not require that non-telecommunications services, such as gift cards, check coupons, or merchandise, be resold. Such items do, however, have economic value. In recognition of this fact, the *Order* requires that telecommunications services subject to the resale obligation of Section 251(c)(4) be resold at rates that give resellers the benefit of the change in rate brought about by offering one-time incentives for more than 90 days. The *Order* does not require ILECs to provide CLPs with toasters, phones, knife sets, hotel accommodations, gift cards, etc. that they might provide to their customers as an incentive to purchase services. The *Order* does require that the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price be determined and that the benefit of such a reduction be passed on to resellers by applying the wholesale discount to the lower actual retail price.

Fifth, BellSouth complains that the Commission did not determine the value of various gift incentives or provide guidance on making such determinations, given that the ILECs' costs to acquire incentive gifts are likely not the same as the face value or actual value of the gifts to the customers. The Commission did not address determining the value of the benefit of an incentive gift promotion nor did it attempt to set strict guidelines for determining the actual rate for a service based on the value of any particular type of incentive gift. The Commission intentionally left this matter open so that the parties would be free to negotiate and arrive at a mutually agreed upon real retail rate. Irresolvable disputes in this area may be brought to the Commission for decision. However, to the extent that it is impossible either to reach a fair accommodation or agreed upon rate based on the promotional offer, or to provide the benefit of the promotional rate to resellers because it is too difficult to calculate such a

rate, then, in the absence of contrary proof, such 90-day-plus promotions would be unreasonable and discriminatory and could not be approved.<sup>3</sup>

Finally, BellSouth complains that CLPs will not be required to pass on the benefit of the promotional rate to their customers. According to BellSouth, a CLP would have every incentive to keep the benefit for itself as a windfall over and above the wholesale discount it already receives. The resale obligation of TA 96 permits a CLP to use the wholesale discount in a way that is beneficial to it without requiring the benefit to be passed directly to end users, so it is possible that a reseller could choose not to pass the promotional rate on to its customers. However, the Commission believes such an outcome is unlikely because the reseller's success is based on being able to sell services at prices that are competitive with the ILEC's prices in the marketplace. If the ILEC offers a long-term promotion and that promotional rate continues to be generally available in the market after the 90<sup>th</sup> day of a promotion, the reseller will need to offer its services at a competitive price and will likely want to maintain the price differential it usually maintains between the ILEC's retail rates and the rates it charges customers. Moreover, BellSouth's argument seems to contemplate that the gift would be provided directly to the CLP, e.g., if a \$100 coupon was offered to BellSouth's customers, BellSouth would have to provide resellers with a \$100 cash payment for each of its customers. However, as discussed above, the *benefit* (not the gift itself) would be delivered to the reseller through the wholesale price charged to the reseller, thus, further reducing the likelihood of undue windfall as described by BellSouth.

## CONCLUSION

The Commission's *Order* regarding resale obligations applicable to one-time gift promotions, pursuant to TA 96, is clarified in accordance with the foregoing discussion.

### B. Resale obligations with respect to mixed bundles

BellSouth complains that, with respect to mixed bundles of telecommunications services and non-telecommunications services, the Commission's *Order* requires ILECs to make the regulated services in the bundle available for resale at a "super discount." According to BellSouth, this super discount results because the *Order* requires the wholesale discount to be applied to the difference between the tariff rate for the telecommunications services in the mixed bundle and the entire price of the bundle, whenever the bundle is offered for a total price that is less than or equal to the stand-alone tariff price for the regulated telecommunications service. Thus, BellSouth believes the *Order* requires ILECs to resell piece-meal portions of mixed bundles at a "super discount." BellSouth argues that it should not be made to break apart such bundles. An ILEC has no obligation to resell either non-telecommunications services

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<sup>3</sup> Prior approval is not required under N.C.G.S. 62-133.5(f), but starting on the 91<sup>st</sup> day of a promotional offering, "an incumbent LEC may impose a restriction [on the resale obligation] only if it [has proved] to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. 51.613(b).

that it provides, or any services (telecommunications or non-telecommunications services) that are provided by entities other than the ILEC.

## DISCUSSION

At the outset, the Commission notes that its *Order* addressed the Public Staff's specific questions, which focused on resale obligations with respect to *regulated* telecommunications services that were part of a gift card promotion or that were part of a bundle of regulated and nonregulated services. Therefore, the *Order* generally discussed resale obligations regarding component services in a mixed bundle in terms of regulated and nonregulated services. However, pursuant to Section 251(c)(4), an ILEC is required "to offer for resale at wholesale rates any telecommunications service that [the ILEC] provides at retail to subscribers who are not telecommunications carriers." It follows from Section 251(c)(4) that an ILEC must resell all telecommunications services, whether regulated or nonregulated, at the true retail price minus the wholesale discount. Thus, an ILEC must offer the reseller any regulated telecommunications services it provides at retail (the tariff list price) for the wholesale rate, and it must also offer the reseller any nonregulated telecommunications services it provides at retail (the retail list price) for the wholesale rate. Accordingly, hereinafter, the Commission will discuss the resale obligation in terms of telecommunications services and non-telecommunications services, not in terms of regulated and nonregulated services.

BellSouth correctly states that an ILEC is not required to resell either non-telecommunications services that it provides or any services that are provided by an entity other than the ILEC. The Commission's *Order* imposed no resale obligation in conflict with this stated principle. The *Order* does not require an ILEC to resell a mixed bundle that contains inside wire maintenance (a non-telecommunications service) nor a mixed bundle that contains long distance service (a telecommunications service) supplied by a non-ILEC such as BellSouth Long Distance, Inc. However, the Commission's *Order* does require that an ILEC make any telecommunications services provided by it and offered as a component of a mixed bundle available for resale on a stand-alone basis for the wholesale rate, which must be determined by applying the wholesale discount rate to the actual, retail, marketplace rate. Accordingly, with respect to mixed bundles of telecommunications services and non-telecommunications services or telecommunications services and services offered by non-ILECs, determining the actual retail rate of any ILEC-provided telecommunications services that are in the bundle is crucial to calculating the wholesale rate a reseller must pay to resell such telecommunications services. As discussed in the *Order*, short-term promotional rates offered for 90 days or less do not constitute retail rates for telecommunications services, but long-term promotional rates offered for 91 days or more do constitute the retail rates that must be used to determine the reseller's wholesale rate.

In its discussion of a "super discount" resale obligation, BellSouth has misunderstood the Commission's *Order*, which the Commission finds should be clarified with respect to resale obligations relating to telecommunications services offered as part

of a mixed bundle. When a package or bundle of a telecommunications service and a non-telecommunications service is offered in excess of 90 days for a total price that equals the price of the telecommunications service, i.e., the price of the telecommunications service is not lowered but the customer receives added value for the price of the telecommunications service alone, the real retail rate in the market for the ILEC-provided telecommunications service must be determined by accounting for the value of the services in the bundle that are not telecommunications services provided by the ILEC. In this situation, the price for the telecommunications service provided by the ILEC is reduced by the value received in the form of additional non-telecommunications services and/or non-ILEC provided services. Thus, if Telecommunications Service 1 ("TS1") retails for \$50 and a mixed bundle consisting of TS1, a Non-Telecommunications Service, and Satellite Television provided by a non-ILEC entity retails for \$50, then TS1 is being discounted by the value of the other services in the bundle (which may appear to be provided as a free gift). If this mixed bundle is offered for 91 days or more, then the wholesale rate that the reseller must pay for TS1 is determined by applying the wholesale discount (to be determined in accordance with the discussion on Pages 6-7 above) to the promotional rate for TS1, which is determined by subtracting the value (benefit) of the giveaways (the Non-Telecommunications Service and the non-ILEC provided Satellite Television Service) from the tariff or retail list price for TS1.

When a package or bundle of a telecommunications services and a non-telecommunications service is offered in excess of 90 days for a total price that is less than the price of the telecommunications service, the real retail rate for the telecommunications service is the total price of the bundle. That is to say, when the total bundle price is less than the telecommunications service in the bundle, the ILEC has determined the value of the discount from the tariff or retail list price and has thereby determined that the actual retail rate for the telecommunications service is the price of the total mixed bundle. (There is no requirement that discounts applicable to individual components sold together in a bundle be determined or passed on to resellers.) For example, if TS1 retails for \$50 and Telecommunications Service 2 ("TS2") retails for \$75, while a mixed bundle consisting of TS1, TS2, a Non-Telecommunications Service, and Satellite Television is offered for \$60, then TS2 is actually available in the marketplace for a real retail rate of \$60. A customer whose goal is to acquire TS2 for the best price in the market can do so by paying \$60 for the bundle rather than the retail list price of \$75, although he must also accept additional services in order to acquire TS2 at the lower rate. Therefore, the wholesale rate that the reseller must pay for TS2 is determined by applying the wholesale discount to \$60, the promotional rate for TS2. In this example, the mixed bundle sells for more than the retail price for TS1, so TS1 is not available in the marketplace for less than the tariff or retail list price of \$50. The customer whose goal is to purchase TS1 for the best price in the market would not purchase the \$60 mixed bundle just to acquire TS1, because he can purchase TS1 for less at the retail list price. Accordingly, an ILEC is only obligated to resell TS1 at the retail list price minus the wholesale discount.

In another example, if TS2 again retails on a stand-alone basis for \$75 and a Non-Telecommunications Service retails for \$10, while a mixed bundle of TS2 and the Non-Telecommunications Service is offered for more than 90 days for \$25, then TS2 would be available in the market for a real retail rate of \$25 even though a subscriber would have to accept the entire bundle to obtain TS2 for that price. Thus, TS2 should be offered to the reseller at the wholesale rate, which would be determined by applying the wholesale discount to the TS2 promotional rate of \$25.

Looking at BellSouth's example on Page 7 of its Motion for Reconsideration, where telecommunications service A retails for \$30, telecommunications service B retails for \$10, and a bundle of both A and B is priced at \$25 for a period in excess of 90 days, a reseller must pay \$25 minus the wholesale discount for service A, since a customer could purchase service A for less than \$30 by purchasing the bundle for \$25. That is to say, the real retail rate for service A would be \$25. For service B, the reseller must pay \$10 minus the wholesale discount because the real retail rate for service B remains at \$10, i.e., a customer cannot acquire service B for less than \$10 by purchasing the bundle. The reseller would not be entitled to purchase service A alone for \$15 ( $\$40 [A + B] \text{ minus } \$25 = \$15$ ) minus the wholesale discount as BellSouth apparently believed was required by the Commission's *Order*. It should be noted that if service B is changed to a non-telecommunications service or to a non-ILEC provided service, the ILEC would have no obligation to offer service B to a reseller at the wholesale rate.

Finally, to reiterate, as was noted above and in the *Order*, when the entire mixed bundle is offered for a price that is more than an end-user subscriber would pay for a telecommunications service if purchased alone at the retail list price, an ILEC is not required to resell the telecommunications services in the bundle for a price that is lower than the retail list price minus the wholesale discount. Instead, the ILEC is only required to resell such telecommunications services at the listed retail price minus the wholesale discount. For example, TS1 retails for \$50, while a mixed bundle of TS1, a Non-Telecommunications Service and Satellite Television supplied by a non-ILEC is offered at \$80. In this example, the mixed bundle cannot be purchased as a lower cost means of acquiring TS1. Thus, the wholesale rate for TS1 would continue to be determined by applying the wholesale discount to the tariff or retail list price for TS1, not the promotional rate that a customer might receive for TS1 if it is purchased as part of the bundle. To clarify further, the Commission's *Order* does not require an ILEC to calculate internal discount prices of components offered in a bundle and then "pick apart" the bundle to offer those internal discounts applicable to telecommunications services (discounts that are never offered to retail customers on a stand-alone basis) to resellers.

## CONCLUSION

The Commission's *Order* regarding federal resale obligations applicable to mixed bundles is clarified in accordance with the foregoing discussion.

### DISPOSITION OF MOTIONS

WHEREUPON, the Commission disposes of the parties' motions as follows:

1. New Phone's Motion to Reconsider IS DENIED.
2. New Phone's alternative Motion for Clarification IS GRANTED in accordance with the foregoing discussion and conclusions stated hereinabove in the section captioned "New Phone's Comments."
3. BellSouth's Motion to Reconsider and its Motion for Stay ARE DENIED.
4. BellSouth's alternative Motion for Clarification IS GRANTED in accordance with the foregoing discussion and conclusions stated hereinabove in the section captioned "BellSouth's Motion."

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 3rd day of June, 2005.

NORTH CAROLINA UTILITIES COMMISSION



Patricia Swenson, Deputy Clerk

tb052305.01

## **EXHIBIT D**

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

OFFICIAL COPY

FILED

Civil Action No.

AUG 02 2005

Clerk's Office  
N.C. Utilities Commission

BELLSOUTH TELECOMMUNICATIONS, )  
INC., )

Plaintiff, )

v. )

NORTH CAROLINA UTILITIES )  
COMMISSION; JO ANNE SANFORD, )  
Chairman; ROBERT K. KOGER, )  
Commissioner; ROBERT V. OWENS, JR., )  
Commissioner; SAM J. ERVIN, IV, )  
Commissioner; LORINZO L. JOYNER, )  
Commissioner; JAMES Y. KERR, II, )  
Commissioner; and HOWARD N. LEE, )  
Commissioner (in their official capacities as )  
Commissioners of the North Carolina )  
Utilities Commission), )

Defendants. )

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

P-100 Sub 72 B

**Nature of the Action**

1. This is an action seeking declaratory and injunctive relief with respect to portions of two Orders (attached hereto as Exhibits 1 and 2) of the North Carolina Utilities Commission (the "Commission") that violate the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "Act").

2. The dispute in this matter arises from a disagreement regarding plaintiff BellSouth Telecommunications, Inc.'s ("BellSouth") resale obligations under 47 U.S.C. §§ 251(c)(4)(A) and 252(d)(3), and more specifically, whether BellSouth or other incumbent local exchange carriers ("ILECs") must provide competing local providers ("CLPs") an additional

discount, on top of the wholesale discount CLPs already receive when purchasing telecommunications services for resale to consumers, for the value of any marketing incentives that BellSouth offers to retail customers for more than ninety (90) days.

3. No CLP has ever argued or complained that BellSouth or other ILECs have an obligation to offer CLPs marketing incentives, or the value of those incentives, in addition to the wholesale discount resellers receive on an ILEC's retail telecommunications services. Nevertheless, following a motion by the Commission's Public Staff and the submission of comments by the Public Staff, BellSouth, and others, on December 22, 2004, the Commission issued an order holding, in pertinent part, that marketing incentives "are in fact promotional offers subject to the FCC's rules on promotion," and that "in order for a gift card type promotion not to require an adjustment to the resale wholesale rate (caused by the fact that the retail price has in effect been lowered), such a promotion must be limited to 90 days, unless the ILEC proves to the Commission that not applying the resellers' wholesale to the promotional offering is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation." Exhibit 1, pp. 11-12.

#### **Parties, Jurisdiction and Venue**

4. BellSouth Telecommunications, Inc. is a Georgia corporation with its principal place of business in Atlanta, Georgia. BellSouth is an ILEC under the Act.

5. Defendants Jo Anne Sanford, Robert K. Koger, Robert V. Owens, Jr., Sam J. Ervin, IV, Lorinzo L. Joyner, James Y. Kerr, II, and Howard N. Lee are Commissioners of the North Carolina Utilities Commission, and are sued in their official capacities for declaratory and injunctive relief only.

6. This Court has subject matter jurisdiction over this action pursuant to the judicial review provision of the Act, 47 U.S.C. § 252(e)(6), and pursuant to 28 U.S.C. § 1331. *See Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 643 (2002) (reviewing a decision of the Fourth Circuit Court of Appeals and finding that federal courts have the authority under 28 U.S.C. § 1331 to review state commission decisions for compliance with federal law).

7. Venue is proper in this district under 28 U.S.C. § 1391(b) because one or more of the defendants resides in this district, and because a substantial part of the events giving rise to this action occurred in this district.

#### **Statutory and Regulatory Background**

8. To foster competition, the Act imposes specific requirements on BellSouth and other ILECs to make their retail telecommunications services available to CLPs at a significantly discounted wholesale rate. Specifically, section 251(c)(4)(A) of the Act requires ILECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." Section 251(c)(4)(B) of the Act further requires ILECs "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of . . . telecommunications service."

9. The Federal Communications Commission ("FCC") has concluded that this statutory resale obligation includes promotional price discounts offered on retail telecommunications services. The FCC has defined "promotions" to include "price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts." *In the Matter of Implementation of the Local Competition Provisions in the*

*Telecommunications Act of 1996* (CC Docket No. 96-98); First Report and Order, FCC No. 96-325, 11 FCC Red 15499, (rel. Aug. 8, 1996) ("First Report and Order"), para. 948.

10. The FCC has also concluded that "short-term promotional prices," which are defined as "promotions of up to 90 days," "do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation." First Report and Order, paras. 949 & 950. Thus, promotional prices offered for a period of 90 days or less need not be offered to resellers at a wholesale discount, whereas promotional prices offered for periods greater than 90 days must be offered for resale at the wholesale discount.

11. The Commission has established that CLPs may purchase BellSouth's retail telecommunications services in North Carolina at a 21.5% wholesale discount less than the retail price for business services and for 17.6% less than the retail price for residential services.

12. Section 252(d)(3) of the Act directs state commissions to "determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing . . . and other costs that will be avoided by the local exchange carrier." Thus, Congress acknowledged that ILECs and CLPs are responsible for the costs of their own marketing initiatives.

13. The competitive environment envisioned by Congress when it passed the Act has become a reality. There is robust competition in North Carolina between ILECs and CLPs, and as a result consumers benefit greatly so long as there is a level playing field that forces ILECs and CLPs to compete fairly.